

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to Chapter 3-122 (Interim)
Hawaii Administrative Rules

June 16, 2003

SUMMARY

1. §§3-122-9.01, 3-122-21, 3-122-22, 3-122-23, 3-122-24, 3-122-26, and 3-122-46 are amended.
2. §3-122-60 is added.
3. §§3-122-63 and 3-122-67 are amended.
4. §§3-122-69 and 3-122-70 are added.
5. §§3-122-74 and 3-122-75 are amended.
6. §3-122-76 is repealed.
7. §3-122-112 is added.

§3-122-9.01 Disclosure of information. (a) A purchasing agency is not required to disclose information identifying the number or the organization or persons that obtained a solicitation; or attended a pre-offeror's conference; or submitted a notice of intent to offer or an offer itself; or an award until:

- (1) The purchase order is issued, in the case of small purchase requests for quotations;
- (2) The deadline for receipt and opening of bids, in the case of invitations for bids; and
- (3) After the contract has been awarded in the case of requests for proposals.

(b) In the case of procurement of professional services, the information specified in section 3-122-63(c), shall be made public after the award. [Eff and comp 11/17/97; am and comp 7/25/02; am 7/3/03]
(Auth: HRS §103D-202) (Imp: HRS §§103D-202, 103D-304)

§3-122-21 Preparing an invitation for competitive sealed bid. (a) The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include:

- (1) Instructions and information to bidders concerning the bid submission requirements, including:
 - (A) The time and date set for receipt of bids;
 - (B) The address of the office to which bids are to be delivered;
 - (C) The maximum time for bid acceptance by the procurement officer issuing the bid; and
 - (D) Any other special information, such as any requirement of intention to bid or the time, date, and location of the pre-bid conference.

The time, date, and location of the receipt of bids and the bid opening shall be the same.
- (2) The purchase description or specifications, evaluation factors, delivery or performance schedule, and inspection and acceptance requirements as are not included in the purchase description.
- (3) The contract terms and conditions, including but not limited to the following, as applicable:
 - (A) Tax clearance requirements pursuant to section 103D-328, HRS;
 - (B) Warranty requirement;
 - (C) Bonding or other security requirements pursuant to subchapter 24;
 - (D) Contract extension provisions; and
 - (E) Statement that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the invitation for bids.
- (4) A bid form which shall include space for, but not limited to, the following:
 - (A) Bid price;

- (B) Brand name and model number and packaging for goods; and
- (C) Information on applicable preferences.
- (5) A requirement that the bidder shall sign the bid form in ink and submit the bid form with the original signature included in the offer.
- (6) Documents by reference, provided that the invitation for bids specifies where the documents can be obtained.
- (7) A statement that bidders shall designate those portions of their offer that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-30(c) and (d); and that the material designated as confidential shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid.
- (8) For construction projects the bidder shall provide:
 - (A) The name of each person or firm to be engaged by the bidder as a joint contractor or subcontractor in the performance of the contract; and
 - (B) The nature and scope of the work to be performed by each.

Construction bids that do not comply with the above requirements may be accepted if acceptance is in the best interest of the State and the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one per cent of the total bid amount.

(b) The terms, requirements, and conditions set out in an invitation for bids, including the specifications appended or incorporated by reference therein, may be altered only by a written addendum issued by the procurement officer. The invitation for bids may require the acknowledgment of the receipt of all amendments issued. Any amendment issued shall be in the form of an addendum pursuant to section 3-122-27.
 [Eff 12/15/95; am and comp 7/25/02; am 7/3/03]
 (Auth: HRS §103D-202) (Imp: HRS §§103D-302, 103D-328)

§3-122-22 Multi-step sealed bidding. (a) Multi-step sealed bidding is designed to obtain the benefits of competitive sealed bidding by award to the lowest responsive, responsible bidder, and at the same time obtaining the benefits of the competitive sealed proposals procedure through the solicitation of unpriced technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

(b) Multi-step sealed bidding is a two-phase process consisting of:

- (1) A technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the State based on criteria set forth in the first phase of the invitation for bids; and
- (2) A second phase in which those bidders whose unpriced technical offers are determined to be acceptable based on criteria set forth in the first phase have their priced bids considered and award is made to the lowest responsive, responsible bidder.

(c) The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price and it is desirable:

- (1) To invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirement;
- (2) To conduct discussions for the purposes of facilitating understanding of the unpriced technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
- (3) To accomplish paragraphs (1) and (2) prior to soliciting priced bids; and
- (4) To award to the lowest responsive, responsible bidder in accordance with the competitive sealed bidding procedures.

(d) A pre-bid conference as contemplated by section 3-122-26 may be conducted by the procurement officer, provided a pre-bid conference shall be required for construction and design-build projects, pursuant to SLH 2003, Act 52, §2, HRS.

(e) Prior to the preparation of phase one a determination shall be made by the procurement officer

that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the phase one proposals. A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.

(f) Phase one of multi-step sealed bidding shall be initiated by the issuance of an invitation for bids in the form required by section 3-122-21, except as hereinafter provided, and in addition shall state:

- (1) That unpriced technical offers are requested;
- (2) Whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, the priced bids shall be submitted in a separately sealed envelope;
- (3) That it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
- (4) That the State, to the extent the procurement officer finds necessary, may conduct confidential oral or written discussions of the unpriced technical offers the contents of which shall not be publicly disclosed until the contract is signed by all parties; and
- (5) That the item being procured shall be furnished generally in accordance with the bidder's unpriced technical offer as found to be finally acceptable and shall meet the requirements of the invitation for bids.

(g) Addenda to the invitation for bids may, after receipt of unpriced technical offers, be issued and distributed only to bidders who submitted unpriced technical offers.

- (1) Those bidders may respond to the amendments in the form of new unpriced technical offers or amendments to the offers submitted.
 - (2) If, in the opinion of the procurement officer, a contemplated addendum will significantly change the nature of the procurement, the invitation for bids shall be cancelled in accordance with subchapter 11, and a new invitation for bids issued.
- (h) The unpriced technical offers shall:
- (1) Not be opened publicly but shall be opened in front of two or more procurement officials;

- (2) Be subject to nondisclosure of trade secrets and other proprietary data to unauthorized persons, as requested by bidders, in writing.
- (i) The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the invitation for bids. The unpriced technical offers shall be categorized as:
 - (1) Acceptable;
 - (2) Potentially acceptable, that is, reasonably susceptible of being made acceptable; or
 - (3) Unacceptable. The procurement officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.
- (j) The procurement officer may initiate phase two of the procedure if, in the procurement officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the procurement officer finds that this is not the case, the procurement officer shall issue an amendment to the invitation for bids or engage in technical discussions set forth in subsection (k).
- (k) The procurement officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable unpriced technical offer, subject to the following rules:
 - (1) During the course of the discussions the procurement officer shall not disclose any information derived from one unpriced technical offer to any other bidder.
 - (2) Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the procurement officer. The submission may be made:
 - (A) At the request of the procurement officer, or
 - (B) Upon the bidder's own initiative.
- (1) Upon completion of phase one, the procurement officer shall:
 - (1) If priced bids were required to be submitted in phase one, open the priced bids from bidders whose unpriced technical offers were found to be acceptable;
 - (2) If technical discussions have been held, or

if material modifications to the procurement item, project or procedure have been made after the original submission of priced bids, return the sealed priced bids to bidders and provide them reasonable opportunity to submit a modified priced bid; or

- (3) If priced bids have not been submitted, invite each acceptable bidder to submit a priced bid.

(m) Phase two shall be conducted as any other competitive sealed bid procurement except as specifically set forth in this subsection:

- (1) No public notice need be given to phase two, submission of priced bids, because the notice was previously given;
- (2) After the contract is signed by all parties, the unpriced technical offers of all bidders shall be open for public inspection and disclosed as follows:
 - (A) The procurement officer shall examine written request of confidentiality for trade secrets and proprietary data in the technical offer of the bidder to determine the validity of the requests.
 - (B) If the parties do not agree as to the disclosure of data, the procurement officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under chapter 3-126, the offer will be so disclosed.
 - (C) If the parties agree to the disclosure, the unpriced technical offers shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

(n) Mistakes may be corrected or bids may be withdrawn at any time during phase one, provided, during phase two, mistakes may be corrected or withdrawal permitted only in accordance with sections 3-122-28, 3-122-29, and 3-122-31. [Eff 12/15/95; am and comp 11/17/97; am and comp 7/25/02; am 7/3/03]
] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS §103D-302)

§3-122-23 Bidding time. (a) A minimum of ten calendar days shall be provided between the date of the last public notice of the solicitation and the date set for receipt of bids.

(b) For construction and design-build projects, a minimum of fifteen calendar days shall be provided between the date of the pre-bid conference and the date set for receipt of bids.

(c) For the technical first phase of a multi-step sealed bid a minimum of fifteen calendar days shall be allowed between the date of the last public notice of the solicitation and the date set for receipt of unpriced technical offers, unless the procurement officer makes a written determination that a shorter time will provide for adequate competition.

(d) Bidders shall have a reasonable time to prepare their bids. [Eff 12/15/95; comp 11/17/97; am and comp 7/25/02; am 7/3/03] (Auth: HRS §§103D-202, 103D-302, SLH 2003, Act 52, §2) (Imp: HRS §103D-302, SLH 2003, Act 52, §2)

§3-122-24 Public notice. (a) Public notice of the solicitation shall be made for the purpose of securing competition.

(b) The public notice of the solicitation shall include the following information:

- (1) A brief description of the good, service, or construction desired;
- (2) Where and when the solicitation will be available;
- (3) How long the solicitation will be available, i.e., the deadline for the responses to the solicitation;
- (4) Other appropriate information, e.g., a notice of intention to offer pursuant to section 3-122-108 or the time, date, and location of the pre-bid conference pursuant to section 3-122-26; and
- (5) For a multi-step sealed bid, a general statement that the bid is multi-step and the due date(s) of the technical offer and price offer.

(c) The public notice of availability of the solicitation shall be publicized as follows:

- (1) At a minimum, statewide and countywide public notices shall be publicized on a purchasing agency or provider internet site.
- (2) Optionally, and in addition to paragraph (1), the following may be used:
 - (A) Newspaper publication:
 - (i) For statewide publication, a daily or weekly publication of statewide circulation; or separate daily or weekly publications whose combined circulation is statewide.
 - (ii) For countywide publication, a daily or weekly publication in the pertinent county.
 - (B) Notice by mail or facsimile transmission to persons on any applicable bidders mailing list, if any.
 - (C) Any other method the procurement officer deems effective for publicizing the solicitation.

(d) A copy of the solicitation shall be made available for public inspection at the office of the procurement officer issuing the solicitation. [Eff 12/15/95; am and comp 11/17/97; am and comp 7/25/02; am

7/3/03] (Auth: HRS §§103D-202, 103D-302) (Imp: HRS
§103D-302)

§3-122-26 Pre-bid conferences. Pre-bid conferences may be conducted to explain the procurement requirements; provided pre-bid conferences for construction and design-build projects shall be required, pursuant to SLH 2003, Act 52, §2, HRS. The purchasing agency may, for offers that have special or unusual requirements, e.g., requiring physical inspection, make attendance at a pre-bid conference a condition for submitting a bid. The condition must be stated prominently in the bid solicitation or in the written notice of a pre-bid meeting.

- (1) Pre-bid conferences shall be announced to all prospective bidders in the solicitation or if decision to hold a pre-bid conference is made after the issuance of the solicitation, the conference shall be announced in an addendum.
- (2) The conference should be held long enough after the solicitation has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids.
- (3) Nothing stated at the pre-bid conference shall change the solicitation unless a change is made by written addendum as provided in section 3-122-27.
- (4) A summary of the conference shall be supplied sufficiently before bid opening to allow consideration of the summary results to all those prospective bidders known to have received a solicitation, in addition to any addendum issued as a result of the conference. [Eff 12/15/95; am and comp 11/17/97; comp 7/25/02; am 7/3/03]
 (Auth: HRS §103D-202, SLH 2003, Act 52, §2)
 (Imp: HRS §103D-302, SLH 2003, Act 52, §2)

§3-122-46 Preparing a request for proposals. (a)
The request for proposals is used to initiate a competitive sealed proposal procurement and shall include:

- (1) The specifications for the goods, services, or construction items to be procured, including a description of the performance or benefit required;
- (2) All contractual terms and conditions applicable to the procurement;
- (3) A statement as to when and in what manner prices are to be submitted;
- (4) A statement concerning whether the proposal shall be accompanied by a proposal security pursuant to subchapter 24 or other evidence of financial responsibility;
- (5) The term of the contract and conditions of renewal or extension, if any;
- (6) Instructions and information to offerors, including pre-proposal conferences, the location where proposals are to be received, and the date, time, and place where proposals are to be received and reviewed;
- (7) Proposal preparation time set to provide offerors a reasonable time to prepare their proposals. A minimum of thirty calendar days between the date of last legal advertisement of the solicitation and the time and date set for receipt of proposals, unless a shorter time is deemed appropriate for a particular procurement that will allow for adequate competition as determined in writing by the procurement officer; provided a minimum of fifteen calendar days shall be provided between the date of the pre-proposal conference and the date set for the receipt of proposals for construction and design-build projects;
- (8) The relative importance of price and other evaluation criteria; and specific evaluation criteria to be used in evaluation of proposals which may include but is not limited to:
 - (A) Technical capability and approach for meeting performance requirements;
 - (B) Competitiveness and reasonableness of price;

- (C) Managerial capabilities; and
 - (D) Best value factors;
 - (9) A statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without discussions; and
 - (10) A statement that offerors shall designate in writing those portions of the unpriced proposal that contain trade secrets or other proprietary data that are to remain confidential, subject to section 3-122-58; that the material designated as confidential shall be readily separable from the proposal in order to facilitate inspection of the nonconfidential portion of the proposal.
- (b) Public notice for goods, non-professional services, and construction shall be given by a purchasing agency with delegated procurement authority by distributing the request for proposals in the same manner provided for distributing an invitation for bids under section 3-122-24. Public notices for professional services shall be in accordance with section 3-122-64.
- (c) Pre-proposal conferences may be conducted in accordance with section 3-122-26; provided a pre-proposal conference shall be required for construction and design-build projects, pursuant to SLH 2003, Act 52, §2, HRS.
- (d) Prior to the public notice for a request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals pursuant to section 3-122-52. [Eff 12/15/95; am and comp 7/25/02; am 7/3/03] (Auth: HRS §103D-202, SLH 2003, Act 52, §2) (Imp: HRS §103D-303, SLH 2003, Act 52, §2)

§3-122-60 Debriefing. (a) The purpose of a debriefing is to inform the nonselected offerors of the basis for the source selection decision and contract award.

(b) A written request for a debriefing shall be made within three working days after the posting of the award of the contract.

(c) Debriefing shall be held, to the maximum extent practicable, within seven working days; provided the procurement officer may determine whether or not to conduct individual or combined debriefings.

(d) A protest submitted pursuant to section 103D-701, HRS, following a debriefing shall be filed within five working days, as specified in section 103D-303(h), HRS. [Eff 7/3/03] (Auth: HRS §§103D-202, 103D-303) (Imp: HRS §103D-303)

§3-122-63 General provisions. (a) Professional services shall be procured in accordance with section 103D-302, 103D-303, 103D-304, 103D-305, 103D-306, or 103D-307, HRS; provided that design professional services furnished by licensees under chapter 464, HRS, shall only be procured pursuant to section 103D-304 or 103D-307, HRS.

(b) Professional service offerors shall be informed in writing prior to their submission of statements of qualifications of any additional criteria as allowed under section 103D-304(e)(4), HRS.

(c) After the contract is awarded, the following information shall be open to public inspection, including but not limited to the contract, the list of qualified persons, the names of selection committee members, the selection committee's criteria for selection established under section 103D-304(d), HRS, and the statements of qualifications and related information submitted by the qualified persons, except those portions for which a written request for confidentiality has been made subject to section 3-122-58.

(d) Amendment to a professional services contract shall require prior approval of the head of the purchasing agency when the increase is at least \$25,000 and ten per cent or more of the initial contract price. [Eff 12/15/95; comp 11/7/97; am and comp 7/25/02; am

7/3/03] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-67 Small purchases of professional services. Small purchases of professional services, except small purchase of design professional services furnished by licensees under chapter 464, HRS, may be conducted pursuant to section 103D-304(j), HRS, or subchapter 8. [Eff 12/15/95; am and comp 11/17/97; am and comp 7/25/02; am 7/3/03] (Auth: HRS §§103D-202, 103D-305) (Imp: HRS §§103D-304, 103D-305)

§3-122-69 Review and selection committees.

Persons who serve on the review or selection committee who are not employees of the purchasing agency shall:

- (1) Have sufficient knowledge to serve on the review or selection committee;
- (2) Serve without compensation, unless justified and determined in writing by the head of the purchasing agency that compensation is justified; and
- (3) Sign an affidavit:
 - (i) Attesting to having no personal, business, or any other relationship that will influence their decision in the review or selection process;
 - (ii) Agreeing not to disclose any information on the review or selection process; and
 - (iii) Agreeing that their names will become public information upon award of the contract. [Eff 7/3/03] (Auth: HRS §103D-202) (Imp: HRS §103D-304)

§3-122-70 Debriefing. (a) The purpose of a debriefing is to inform the nonselected offerors of the basis for the source selection decision and contract award.

- (1) A written request for a debriefing shall be made within three working days after the posting of the award of the contract.
- (2) Debriefing shall be held, to the maximum extent practicable, within seven working days; provided the procurement officer may determine whether or not to conduct individual or combined debriefings.

(b) A protest submitted pursuant to section 103D-701, HRS, following a debriefing shall be filed within five working days, as specified in section 103D-303(h), HRS. [Eff 7/3/03] (Auth: HRS §103D-202)
(Imp: HRS §103D-304)

§3-122-74 General provisions. (a) Small purchases shall be subject to section 103D-305, HRS, and do not require public notice or public bid openings.

(b) Small purchase contracts for professional services may be procured pursuant to this subchapter or section 103D-304(j), HRS; provided that small purchase of design professional services furnished by licensees under chapter 464, HRS, shall be procured in accordance with section 103D-304, HRS.

(c) Unless otherwise exempt, purchasing agencies delegated small purchase authority shall comply with state procurement office price or vendor lists, price schedules, or other chief procurement officer lists and schedules, where applicable.

(d) Purchases shall not be parceled by dividing the purchase of same, like, or related items of goods, services, or construction into several purchases of smaller quantities, so as to evade the statutory competitive bidding requirements. For additional details, refer to chapter 3-131.

(e) Preferences pursuant to part X, chapter 103D, HRS, shall not apply to small purchases. [Eff 12/15/95; am and comp 11/17/97; am and comp 7/25/02; am 7/3/03] (Auth: HRS §§103D-202, 103D-305)
(Imp: HRS §103D-305)

§3-122-75 Goods services, and construction. (a)
Goods, services, and construction subject to section
103D-305, HRS, shall:

- (1) Insofar as it is practical be based on the
agency's specifications, with adequate and
reasonable competition;
- (2) Consider all criteria, including but not
limited to quality, warranty, and delivery;
and
- (3) Be awarded to the vendor providing the best
value to the State.

(b) The procurement policy board shall by
procurement directive establish the procedures to be
used for this section. [Eff 12/15/95; am and comp
11/17/97; am and comp 7/25/02; am 7/3/03]
(Auth: HRS §§103D-202, 103D-305) (Imp: HRS §103D-305)

§3-122-76 REPEALED. [R 7/3/03]

§3-122-112 Compliance with all laws governing entities doing business in the State. (a) This section shall be in accordance with section 103D-310(c), HRS, and shall apply to procurements of \$25,000 or more.

(b) This section shall not hinder or impede the State in contracting for any projects involving funding from the federal government. [Eff 7/3/03]
(Auth: HRS §§103D-202, 103D-310) (Imp: HRS §103D-310)

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendments to chapter 3-122, Hawaii Administrative Rules, on the Summary Page dated June 16, 2003 were adopted as interim rules at the Procurement Policy Board meeting on June 16, 2003. Pursuant to section 103D-202, HRS, these sections shall be issued by Procurement Directive and be effective until January 25, 2004.

These interim rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

_____/s/_____
PHYLLIS M. KOIKE
Chairperson
Procurement Policy Board

_____/s/_____
RUSS K. SAITO
State Comptroller

APPROVED AS TO FORM:

_____/s/_____
Deputy Attorney General